PREME COURT, U. S.

Court, U.S.
D
JUL 28 1970
ROBERT SEAVER, CLERK

in the

Supreme Court

of the

United States

October Term, 1970

No. 460

SHELBY LOUIS POLLACK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VARON and STAHL, P.A.
Attorneys for Petitioner
2432 Hollywood Boulevard
Hollywood, Florida 33020

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINION BELOW	2
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3 - 6
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	6 - 16
1. The trial court committed prejudicial error when after it appeared on the morning of the trial that the petitioner's co-defendant would not be present for the trial because of illness the court did not allow the petitioner to make a showing that his co-defendant would be a material witness, and would in fact testify in his behalf, and then used the reason that there was no such showing to deny the petitioner's motion for a continuance	6 - 11
2. The court committed prejudicial error when it allowed into evidence the identification testimony of a government witness when the identification was based, among other things, on the witness being shown a single photograph of the petitioner on the day of trial and a subsequent viewing of the petitioner in the hall outside the courtroom	12 - 16
CONCLUSION	17
CERTIFICATE OF SERVICE	18
APPENDIX	App. 1 - App. 3

AUTHORITIES CITED

Case	Page
Everitt v. United States, 281 F.2d 429 (5th Cir. 1960)	10
Foster v. California, ___U.S.___ 89 S.Ct.___ 22, L.ed. 2d 402	14
Leino v. United States, 338 F.2d 154 (10th Cir. 1964)	10
Mason v. United States 414 F.2d 1176	14, 15
Scott v. United States 263 F.2d 398, 400 (CA-5-1959)	10
Simmons v. United States 390 U.S. 377	13, 15
Stein v. United States 271 F.2d 895, (CA-9-1959)	11
United States v. Gilmore, 398 F.2d 679 (7 Cir.)	16
United States v. Knohl, 379 F.2d 427 (CA-2-1967)	11

Miscellaneous

28 U.S.C. 1254(1)	2
Title 18, U.S.C., Section 1341 and 2	3
Section 1341, Title 18 U.S.C.	3
18 U.S.C. Section 371	3

in the
Supreme Court
of the
United States

October Term, 1970

NO. _____

SHELBY LOUIS POLLACK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner, Shelby Louis Pollack prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 29, 1970, affirming the judgment of conviction of the United States District Court for the Southern District of Florida sentencing the petitioner to three years' imprisonment.

OPINION BELOW

The trial in the District Court was by jury. The Opinion of the Court below is appended hereto as Appendix A.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the judgment sought to be reviewed at the time of its entry is June 29, 1970, and this petition is filed within thirty days of that order.

2. The statutory provision believed to confer to this court's jurisdiction to review the judgment in question is by writ of certiorari is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court commit prejudicial error when after it appeared on the morning of the trial that the petitioner's co-defendant would not be present for the trial because of illness the court did not allow the petitioner to make a showing that his co-defendant would be a material witness, and would in fact testify in his behalf, and then used the reason that there was no such showing to deny the petitioner's motion for a continuance?

2. Did the Court commit prejudicial error when it allowed into evidence the identification testimony of a government witness when the identification was based, among other things, on the witness being shown a single photograph of the petitioner on the day of trial and a subsequent viewing of the petitioner in the hall outside the courtroom?

STATEMENT OF THE CASE

The Grand Jury, on January 23, 1969, filed an indictment against the Petitioner and a Samuel David Roseman and Julian Graham Silver charging them with devising a scheme to defraud certain suppliers of merchandise by making false pretenses and promises and by using the United States mails to execute the scheme in violation of Title 18, U.S.C., Section 1341 and 2, i.e. mail fraud. The Grand Jury further charged, in Counts 2 through 18 inclusive that certain particular suppliers were defrauded by use of the said scheme and by the use of the United States mails. Further, in Count 19, the Grand Jury charged the Petitioner with being a member of a conspiracy to violate Section 1341, Title 18 U.S.C., i.e. mail fraud in violation of 18 U.S.C. Section 371.

Counsel for the Petitioner made the usual pretrial motions and they were disposed of by the trial court. A jury trial commenced on August 6, 1969 before the Honorable Emett C. Choate, Senior United States District Judge.

The case was called for trial on August 6, 1969. At that time counsel for the defendant Roseman announced that his client was seriously ill in the hospital. At that time counsel for the Petitioner moved for a continuance of Petitioner's trial because of the fact that Roseman was an indispensable witness for the Petitioner. At the same time counsel for the Petitioner requested that the court have an evidentiary hearing to determine whether in fact the sick defendant would be a material witness for the Petitioner. The Court stated that it only wanted to consider Mr. Roseman's statement and would not take

the word of anybody else as to whether or not Roseman would be a material witness. Before there was no definitive word as to whether or not Roseman would be able to stand trial or to be a witness, the Court ordered that the jury be picked.

A statement was taken by a Dr. Lindau at the hospital at 12:40 P.M. on the date of the trial and he indicated that it would be three to six months before the defendant Roseman could be subject to cross-examination. Upon learning this, the Court severed the case of Roseman and then denied Petitioner's motion for a continuance, stating that the Petitioner must show that Roseman was a material witness, although counsel for the Petitioner noted that in light of the doctor's statement, it was impossible to do so.

The trial then began and the Government first called certain representatives of answering services and secretarial services. Although these witnesses testified that they had been contacted to set up answer and mail service for certain companies which were used as references by Southern Import and Export Company, the company which the Petitioner was allegedly doing business as, none of the witnesses identified the Petitioner. The Government then called Carol Perry, who testified that she did secretarial work for Southern Import and Export Company and that she had seen the Petitioner in the store and was known to her as "Mike". Other Government witnesses were called who were manufacturers and suppliers, who testified that certain goods had been ordered by Southern Import and Export Company and that these goods were shipped to that company, but payment was not received. They further testified that the credit references that were

used by Southern Import and Export Company were the same credit references which had been set up by a Mr. Manero who was subsequently identified as Mr. Roseman. There were two witnesses who worked in warehouses where the goods from the suppliers were shipped, pending being picked up by representatives of Southern Import and Export Company. These were the witnesses McElhaney and Iacobucci. They testified that they had seen the petitioner at their warehouses picking up these goods from the suppliers. Mr. Iacobucci testified that he could not identify the petitioner when about two months after he saw him at his warehouse he was shown appellant's picture by Government agents, that he could not identify the petitioner when he was shown a single picture of him on the morning of the trial, and that his identification only occurred when he saw him out in the hall at the same time as when the Petitioner was identified by the witness McElhaney.

The Government also called as witnesses certain retailers who the Petitioner had sold some of these goods having been the same as those which had been ordered through the mail from the suppliers who had testified. There was also some testimony from handwriting and fingerprint experts. The handwriting expert testified that certain documents ordering goods from the suppliers had been signed by the Petitioner. This did not include any credit references however. The testimony of the fingerprint expert, Mr. Mooney was that the Petitioner's fingerprints were found on a letter and a purchase order from Southern Import and Export Company which include a credit reference.

The Government rested its case and neither defendant offered any testimony in defense.

The jury returned a verdict of guilty as to Counts 1 through 7 inclusive, Counts 9 through 14 inclusive, and Counts 16 through 19 inclusive.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN AFTER IT APPEARED ON THE MORNING OF THE TRIAL THAT THE PETITIONER'S CO-DEFENDANT WOULD NOT BE PRESENT FOR THE TRIAL BECAUSE OF ILLNESS THE COURT DID NOT ALLOW THE PETITIONER TO MAKE A SHOWING THAT HIS CO-DEFENDANT WOULD BE A MATERIAL WITNESS, AND WOULD IN FACT TESTIFY IN HIS BEHALF, AND THEN USED THE REASON THAT THERE WAS NO SUCH SHOWING TO DENY THE PETITIONER'S MOTION FOR A CONTINUANCE.

On the morning of the petitioner's trial which was August 6, 1969, it became apparent for the first time that the defendant Roseman was seriously ill in the hospital. The trial court, before continuing the case as to the defendant Roseman, made it quite plain that it wanted objective proof as to Roseman's illness.

The Court then asked the other Defendants, i.e., the Petitioner and the Defendant Silver whether they were ready. In response to this, and based upon the fact that the Co-Defendant Roseman was now not available, counsel for the Appellant asked the Court for a continuance on the grounds that Roseman was an indispensable witness for the Petitioner, at the same time, asking the Court to grant, in light of this development, an evidentiary hearing in regard to Roseman being in fact an indispensable witness who would testify in behalf of the Petitioner. Apparently the Court was agreeable to an evidentiary hearing.

> "THE COURT: We will be able to take Mr. Roseman's statement. If he has a heart condition, we can take his statement and then we will decide that."

Counsel for the Petitioner further brought to the Court's attention the possibility of calling another attorney Donald Bierman, who would testify at the evidentiary hearing that Roseman was in fact an indispensable witness based upon certain representations that Roseman made in Mr. Bierman's office.

The Court evidently felt that Mr. Bierman's testimony would be of little value and preferred to have Mr. Roseman's own testimony.

> "THE COURT: I am going to take Mr. Roseman's statement. That would be much better. I do not want Mr. Bierman's or somebody else's statement. Now what else do we have on behalf of your client."

Later on the Court said,

> "Get him going right away, if you can, and notify the other side, and you notify the physician about Mr. Roseman, because we do not want to kill him or anything like that, but we do want him to attend, *and we want to know his condition, so we can take a statement as respects to this other defendant right away.*"

After the jury was picked the Court counsel for the Government and the Defendants learned that Mr. Roseman was in fact so critically ill that he could not even make a statement. At this point, counsel for the Petitioner again attempted to ask for a continuance and evidentiary hearing.

> "MR. KAY: Your Honor, Defendant Pollack would consider a continuance based upon the fact that the Defendant Roseman —
>
> "THE COURT: You see, this is an old racket. I am not going to continue anything except the man who is sick.
>
> "MR. KAY: Your Honor, he would testify (37) in our behalf that —
>
> "THE COURT: You have no occasion now.
>
> "MR. KAY: It puts us in a bad position. I am in a position that it would be impossible to call him as a material witness in our case.
>
> "THE COURT: You have to show that he will be.
>
> "MR. KAY: It is impossible to do so."

The Petitioner, therefore, was forced to go to trial and did not have the benefit of the Co-Defendant Roseman's testimony. It is clear from a study of the record that the evidence showed that Mr. Roseman was a main figure in the alleged conspiracy and in the alleged mail fraud.

There is no question then that Mr. Roseman would have been a material witness. The very fact that he was the Co-Defendant named in the Indictment also suggests this fact.

The remaining questions to be considered were whether, if called, the Defendant Roseman would testify and whether he would testify in behalf of the Defendant. These questions could have been answered, if the Court would have granted an evidentiary hearing to the Petitioner so that he could make a showing to this effect. Petitioner's counsel eluded to this when he talked about a conference that was had at a lawyer's office in regard to Mr. Roseman's plans. There was also the possibility that the Defendant Roseman would plead guilty and therefore have no reason whatsoever not to testify in behalf of the Petitioner. This was eluded to by the Court.

The best proof of the fact that there was a strong possibility of Roseman pleading guilty is that after Petitioner's trial was over on October 20, 1969, the Defendant Roseman did, in fact, plead guilty. If the trial of the Petitioner had been continued until that date, the Petitioner would have had the benefit of Co-Defendant Roseman's testimony and this may have exculpated him.

A continuance is in the discretion of the trial Court. However, where there is an abuse of this discretion it may constitute reversible error. *Everitt vs. United States*, 281 F.2d 429, (5th Cir. 1960).

When a continuance is sought because of the need of the Defendant to obtain a witness, the continuance will not be granted unless the accused shows who the witness is, what his testimony will be, and the diligence that has been used to obtain the witness admittance. This was enunciated in the case of *Leino vs. United States*, 338 F.2d, 154, (10th Cir. 1964).

The trial court did not, however, give the Petitioner the opportunity to make this required showing and instead forced the Petitioner to trial. It was no fault of the Petitioner that Co-Defendant Roseman suffered a critical heart attack the day before trial, and he had no reason to believe that the Defendant Roseman would not be present on the date of trial to perhaps plead guilty and testify in the Petitioner's behalf. When it became apparent that the Co-Defendant Roseman would not be present, the Petitioner requested an evidentiary hearing so that he could make a showing in regard Roseman's materiality, his possible inclinations toward pleading guilty, and to testify in the Petitioner's behalf.

In the case of *Scott vs. United States*, 263 F.2d 398, 400, (CA-5-1959), it was held to be reversible error to deny a continuance where a Co-Defendant was the chief conspirator had been allowed to plead no-contest and sentenced, had been subpoenaed by the Defendant, had agreed to be present, and no evidence was shown to in-

dicate mere delay sought, and the Defendant was surprised at his non-appearance. Petitioner was surprised at Roseman's non-appearance since he was Co-Defendant, and if he had been allowed to have an evidentiary hearing, it may well have appeared that Roseman intended to plead guilty and would have testified in behalf of the Petitioner.

The fact that Roseman, did in fact plead guilty subsequent to Petitioner's trial, is a vital fact which must be considered by this Honorable Court. In the case of *United States vs. Knohl*, 379 F.2d 427, (CA-2-1967), the United States Court of Appeals for the Second Circuit affirmed a conviction where a continuance had been sought by the Defendant and denied. They arrived at their decision by taking advantage of hindsight to determine whether there had been abuse of discretion. The same procedure was used in the case of *Stein vs. United States*, 271 F.2d 895, (CA-9-1959). This Court should take advantage of the benefit of hindsight i.e., that *Roseman* in fact pleaded guilty to the charge (R. 554-555-556-557), in determining whether there was prejudice to the Defendant when the Court both denied him a continuance, and a hearing to show why the continuance should have been granted.

When Petitioner sought his continuance on the day of trial, no continuance had ever been granted before. Petitioner believes that the trial Court would have allowed an evidentiary hearing if Roseman had been able to testify, but his inability to testify was not any fault of the Petitioner. The court should have then retreated from its original position and allowed other testimony which very well might have been relevant in determining whether a continuance should have been granted.

2.

THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED INTO EVIDENCE THE IDENTIFICATION TESTIMONY OF A GOVERNMENT WITNESS WHEN THE IDENTIFICATION WAS BASED, AMONG OTHER THINGS, ON THE WITNESS BEING SHOWN A SINGLE PHOTOGRAPH OF THE PETITIONER ON THE DAY OF TRIAL AND A SUBSEQUENT VIEWING OF THE PETITIONER IN THE HALL OUTSIDE THE COURTROOM.

During petitioner's trial a government witness was called to the stand and he identified the petitioner as a man who had been present at his warehouse to pick up some merchandise. This was an important aspect of the case since petitioner's contention was that he was a salesman of certain merchandise and was not involved in the ordering of it, while the government contended that he was involved in the ordering which, of course, was done by fraud.

During direct and cross examination of the identification witness the following facts became known in regard to identification.

1. The witness had allegedly seen the Petitioner for the first and only time on August 8, 1968.

2. Approximately two months after that Government agents talked to him about the incident and showed him a number of pictures. He was not able positively to identify any one of the pictures.

3. On the morning of the trial he was shown a single picture of the Petitioner by the government and the witness still could not identify the Petitioner as the man who had been in the warehouse on August 8.

4. That during a recess the witness Iacobucci and the witness McElhaney, who had just testified previously identified the Petitioner in the hall (R. 242-244).

After the testimony of the identification witness, counsel for the Petitioner moved that the testimony be suppressed. The Court denied the motion.

This Court, in *Simmons v. United States*, 390 U.S. 377, held that an accused claim that under the circumstances the police identification procedure was unduly prejudicial must be evaluated in the light of the totality of the surrounding circumstances. It held further that convictions based upon eye-witness identification following a pretrial identification by photographs would be set aside if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. In the *Simmons* case, the Court allowed the identification because the witness was shown *six* photographs one day after the alleged viewing and the witness identified another set of pictures prior to trial.

The Petitioner submits that the case at bar includes a combination of *Simmons* and the *Wade-Gilbert-Stovall trilogy*. This is because the use of photographs by the Government was totally suggestive, especially the showing of the Petitioner's photograph singularly on the morning of the trial. But if this is not enough the fact that the

witness identified the Petitioner in the hall outside the court clearly requires that the identification testimony be suppressed.

In the recent case of *Foster v. California*, ___ U.S. ___ 89 S.Ct. ___ 22, L.ed.2d 402, this Court held a line-up was so suggestive as to deny the defendant due process of law. In a footnote found at page 406, the Court states:

> "The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury. But it is the teaching of Wade, Gilbert, and Stovall, supra, that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law."

Petitioner would submit that the identification procedures used in the case at bar are, as pointed out in *Foster*, so defective as to make the identification inadmissible as a matter of law.

The Circuit Court of Appeals for the District of Columbia Circuit was faced with a quite similar situation in the recent case of *Mason v. United States*, 414 F.2d 1176. In that case a savings account depositor discovered some money missing from her savings account passbook. She found that someone had used a forged withdrawal slip. The teller, Miss Schultz, was shown a single photograph of the Appellant by the police of the afternoon of the withdrawal. Two weeks later the Appellant was brought to a preliminary hearing. The police told Miss Schultz to sit

among the spectators and watch the area where defendants awaiting hearings would be seated to see if she recognized anyone. She spotted the Appellant among the group of a dozen defendants seated in two rows and reported to the police. At the trial the Appellant objected to her identification testimony on the grounds that he was denied counsel at the identification and that the line-up and showing of the picture were impermissibly suggestive. The Court stated photographic identification must be excluded in they result in a suggestive viewing.

> "Photographic identification must be excluded if they result from a viewing 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable mis-identification. (Citing *Simmons v. United States, Supra*) The showing of a single photograph is like all identification procedures involving a single suspect highly suggestive. In the instant case it was also completely unnecessary."

The Court, in *Mason*, stated that identification testimony such as this could only be admitted if the Government had established "by clear and convincing evidence that it was * * * based upon observations of the suspect other than the illegally obtained * * * identifications.

Petitioner submits that the case *sub judice* is a perfect example of a situation where the identification does not have a clear and convincing independent basis. The proof of this is that only two months after the initial observation the witness could not identify the Petitioner from photographs that were shown him. Even when he was shown a single picture of the Petitioner on the morning

of the trial he could not identify him. Just as in the *Mason* case the identification only occurred when he saw the Petitioner in the hall along with the other identification witness, Mr. McElhaney.

In the recent case of *United States v. Gilmore*, 398 F.2d 679 (7 Cir.), an identification was excluded because the identification took place when the accused was brought before the witness singularly.

The Petitioner submits that in almost every case which has considered the question of identification testimony the totality of the circumstances was far less suggestive than the circumstances in the case at bar. It seems that in the case at bar the Government made use of every condemned procedure in regard identification testimony.

CONCLUSION

The petition for writ of certiorari should be granted and the judgment reversed.

Respectfully submitted,

VARON and STAHL, P.A.
Attorneys for Petitioner

By EDWARD M. KAY
EDWARD M. KAY

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33 I have mailed ~~two~~ copies of this ~~brief~~ to the Honorable Robert Rust, United States Attorney at the United States Post Office Building, 300 Northeast First Avenue, Miami, Florida, on this __ day of July, 1970.

VARON and STAHL, P.A.
Attorneys for Petitioner
2432 Hollywood Boulevard
Hollywood, Florida 33020

By EDWARD M. KAY
EDWARD M. KAY